

A CONTEMPORARY THEORY OF HUMANITARIAN INTERVENTION

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I. INTRODUCTION

The question of humanitarian intervention is not new. Coercive intervention by a foreign power into the arguably internal affairs of a sovereign state, for allegedly humanitarian reasons, has always been controversial. Whether, or under what circumstances, such intervention is permitted by international law has been widely disputed. If there is any consensus, it is that such intervention should generally be prohibited by international law, or should at least be narrowly restricted by various substantive and procedural limitations.

This article will argue, however, that such a restrictive approach to humanitarian intervention is no longer appropriate. It makes diminishing historical sense given the current and foreseeable practical realities of world affairs. Historical trends demonstrate that the costs of adhering to traditional restrictions on humanitarian intervention are increasing, while the value of such restrictions is decreasing. For several reasons, it seems probable that humanitarian intervention is currently being undersupplied from the standpoint of overall collective welfare. Loosening some of the traditional legal restrictions on humanitarian intervention would likely lead to significant benefits, with very limited risk of substantial additional costs. Substantial change in the international law of humanitarian intervention is therefore appropriate.

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II. THE HISTORICAL DISTASTE FOR HUMANITARIAN INTERVENTION

Humanitarian intervention has been defined in various ways, as has the broader concept of intervention itself. Intervention has been defined as broad enough to include even the verbal remarks of government actors concerning another state's affairs.¹ On the other hand, other writers have restricted the concept of intervention to include only "dictatorial interference by a state in the internal affairs of another state or in the relations between other states."² The narrower scope of the latter definition makes it more likely that useful, reasonably accurate generalizations about intervention, or humanitarian intervention, can be drawn. But such definitions may be excessively narrow for some purposes. Some writers, for example, look to whether the intervention in question was popularly welcomed³ or was invited or sought by the government or the people affected as one criterion of the moral justification of the intervention.⁴ Invited or welcomed humanitarian intervention may still be appropriately classifiable as an act of intervention even if it is not "dictatorial interference."⁵

Defining intervention, or humanitarian intervention, in terms of "dictatorial interference" raises the further issue of the normative connotation of the definition itself. So defined, intervention is difficult to justify and defend. The opposite problem arises when humanitarian intervention is defined in terms such that moral endorsement is essentially built into the concept itself. In Ellery Stowell's well-known treatise,⁶ for example, humanitarian intervention is defined as "the reliance upon force for the justifiable purpose of protecting the inhabitants of another state from treatment which is so arbitrary and persistently abusive as to exceed the limits of that authority within which the sovereign is presumed to act with reason and justice."⁷

1. See, e.g., R. VINCENT, *NONINTERVENTION AND THE INTERNATIONAL ORDER* 3 (1974); Bazylar, *Reexamining the Doctrine of Humanitarian Intervention in Light of the Atrocities in Kampuchea and Ethiopia*, 23 *STAN. J. INT'L L.* 547, 547 n.1 (1987) (citing authority).

2. Wright, *The Legality of Intervention Under the United Nations Charter*, in 51 *PROC. AM. SOC. INT'L L.* 79 (1958) (supplement).

3. See, e.g., Levitin, *The Law of Force and the Force of Law: Grenada, the Falklands, and Humanitarian Intervention*, 27 *HARV. INT'L L.J.* 621, 654 (1986) ("if the people throw flowers, the invasion is lawful, if they do not throw flowers, or if they throw anything else, the invasion is unlawful").

4. See, e.g., Bond, *A Survey of the Normative Rules of Intervention*, 52 *MIL. L. REV.* 51, 62 (1971).

5. See *supra* note 2 and accompanying text.

6. E. STOWELL, *INTERVENTION IN INTERNATIONAL LAW* (1921).

7. *Id.* at 53. See also Behuniak, *The Law of Unilateral Humanitarian Intervention by Armed Force: A Survey*, 79 *MIL. L. REV.* 157, 158 (1978) (quoting Stowell's definition); Graham,

More recent attempts at defining humanitarian intervention have also built some degree of favorable evaluation into the concept itself.⁸ Given the favorable connotation of the term "humanitarian," this may to a degree be unavoidable.⁹ But in light of the controversy, if not widespread unpopularity, of actions that naturally seem to fall within the scope of humanitarian intervention, we are best served by more descriptively neutral definitions, as opposed to mostly normative ones. Such an approach would allow writers an unimpaired opportunity to intelligibly debate whether humanitarian intervention in general, or particular acts thereof, are morally justified or morally permissible, rather than whether an act that descriptively resembles humanitarian intervention should fall outside the definition of humanitarian intervention because the speaker believes it to be morally good or bad. Largely descriptive, evaluatively neutral definitions of humanitarian intervention are both possible¹⁰ and desirable.¹¹ However, this article will not be limited to any particular conception.

Historically humanitarian intervention has been a surprisingly unpopular doctrine even when it has been neutrally defined and described. This continues to be true today. Its moral soundness and legality under principles of international law have been historically controversial and even widely denied.¹² The contemporary status of the doctrine is at best no more secure. In fact, Michael Akehurst has suggested that "the United Nations debates on Cambodia in 1979 provide some evidence that there is now a consensus among states in favor of treating humanitarian intervention as illegal."¹³ Certainly, the Vietnamese invasion of Cambodia might, in light of the appalling

Humanitarian Intervention in International Law as Related to the Practice of the United States, 22 MICH. L. REV. 312, 314 (1924) (quoting Stowell's definition).

8. See, e.g., F. TESON, HUMANITARIAN INTERVENTION 5 (1988) (defining humanitarian intervention as "the proportionate transboundary help, including forcible help, provided by governments to individuals in another state who are being denied basic human rights and who themselves would be rationally willing to revolt against their oppressive government").

9. To some degree, however, the favorable connotation of "humanitarian" may be offset by any presumed unjustifiability of "intervention" into the internal affairs of sovereign states.

10. See, e.g., R. VINCENT, *supra* note 1, at 13 (intervention as "that activity undertaken by a state, a group within a state, a group of states or an international organization which interferes coercively in the domestic affairs of another state"). While "interferes" is negatively connoted, the concept of coercion can be given a neutral, descriptive meaning. See, e.g., A. WERTHEIMER, COERCION 188 (1987). *But cf.* Ryan, *The Normative Concept of Coercion*, 188 MIND 481, 483-84 (1980) (adopting a normatively-based definition).

11. *But cf.* Bazzyler, *supra* note 1, at 547 n.1 ("there is little use in defining the doctrine of humanitarian intervention").

12. See the authorities cited and discussed in E. STOWELL, *supra* note 6, at 58 & 58 n.12.

13. Akehurst, *Humanitarian Intervention*, in INTERVENTION IN WORLD POLITICS 95, 99 (H. Bull ed. 1984).

character of the Pol Pot regime, have been characterized as raising the issue of humanitarian intervention.¹⁴ However, in the course of the United Nations debates, "[n]ot a single state spoke in favor of the existence of a right of humanitarian intervention."¹⁵ Such skepticism concerning at least unilateral forcible humanitarian intervention is also reflected among contemporary theorists.¹⁶ Most of these theorists, as this article proposes, would either proscribe or severely restrict the exercise of humanitarian intervention.

Whatever its underlying moral status, humanitarian intervention is widely thought to have been outlawed or severely restricted by the United Nations Charter (Charter).¹⁷ The Charter, while preserving the right of "individual or collective self-defense"¹⁸ against military attack, provides that "[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."¹⁹ Whether or not the latter provision still constitutes an effective, operative international legal norm,²⁰ it is readily and popularly read by many commentators²¹ as proscribing not merely aggressive, expansionist war, but also most or all forms of humanitarian intervention.

For example:

Most authors interpret Article 2(4) as imposing a total ban on the use of force in international relations except when another provision of the Charter expressly recognizes or creates an exception to that ban. This broad interpretation of Article 2(4) is confirmed by the *travaux préparatoires* of the Charter, and in recent years has received the support of most of the member states of the United Nations.²²

14. See generally, *id.*

15. *Id.* at 97.

16. See, e.g., Farer, *Defending Human Rights in the Post-Reagan Era: Candor and Competence*, 28 VA. J. INT'L L. 855, 860-61 (1988) (ruling out consideration of unilateral military intervention for human rights purposes); Schacter, *The Lawful Resort to Unilateral Use of Force*, 10 YALE J. INT'L L. 291, 293 (1985) ("I would underline the importance of rejecting the contention that force may be used unilaterally to achieve such laudable ends as freedom, self-rule and human rights").

17. U.N. CHARTER.

18. See U.N. CHARTER art. 39.

19. *Id.* art. 2, para. 4.

20. See Rostow, *The Legality of the International Use of Force by and from States*, 10 YALE J. INT'L L. 286, 290 (1985) ("[a]t this moment, . . . it is impossible to determine whether Article 2(4) of the Charter is an operative legal norm").

21. See, e.g., Akehurst, *supra* note 13.

22. *Id.* at 106 (citations omitted).

Such an interpretation of the Charter has received scholarly support.²³ It is not the only plausible interpretation,²⁴ however, and narrower views of Article 2(4) have been advocated.²⁵

Perhaps the most intriguing rationale for viewing at least some coercive humanitarian intervention as consistent with the Charter, however, relies on something loosely akin to the domestic contract law doctrines of (1) frustration of purpose²⁶ and (2) failure of condition precedent.²⁷ On this approach, the willingness of the Charter signatories to forego unilateral humanitarian intervention was crucially dependent upon the assumption that the United Nations would establish an effective collective security enforcement mechanism. The absence of such a mechanism works to excuse a breach of Article 2(4) in the form of humanitarian intervention, at least in extreme cases.²⁸ Such arguments turn partly on almost unresolvable issues of the contemporary intent of the ratifiers. However, in the absence of widespread international endorsement of the principle of humanitarian intervention, adopting the "condition precedent" approach seems questionable. One commentator observed that "[s]uch an argument . . . could undermine the entire Charter. Nothing in the Charter suggests that it is to be ignored if certain objectives are not satisfied."²⁹

Ultimately, the legal standing of the doctrine of humanitarian intervention should not be expected to diverge far from its level of popularity in the international community, and the doctrine is not currently popular. This might initially seem surprising, in view of the beneficial

23. See, e.g., Wright, *supra* note 2, at 88 ("military intervention by states is restricted by the Charter to necessities of individual or collective self-defense, explicit treaty permissions or requests, or United Nations authorizations"); Bazyler, *supra* note 1, at 548; Schacter, *supra* note 16, at 294; Watson, *Legal Theory, Efficacy and Validity in the Development of Human Rights Norms in International Law*, 1979 U. ILL. L.F. 609, 619 n.41 ("Article 2(4) . . . outlaws the use of force except in very limited situations").

24. See, e.g., Bond, *supra* note 4, at 66 (no bar if the intervention not aimed at "reforming or replacing the government"); Moore, *The Control of Foreign Intervention in Internal Conflict*, 9 VA. J. INT'L L. 209, 262 (1969) (humanitarian intervention as not necessarily threatening territorial integrity or political independence).

25. See the variety of less sweeping interpretations of article 2(4) canvassed in Lillich, *A United States Policy of Humanitarian Intervention and Intercession*, in HUMAN RIGHTS AND AMERICAN FOREIGN POLICY 278, 288-89 (D. Kommers & G. Loescher eds. 1979).

26. See RESTATEMENT (SECOND) OF CONTRACTS § 261 (1979).

27. See *id.* § 225.

28. See, e.g., Bazyler, *supra* note 1, at 579-80; Behuniak, *supra* note 7, at 185-86; Reisman, *Criteria for the Lawful Use of Force in International Law*, 10 YALE J. INT'L L. 279, 279-80 (1985).

29. Hassan, *Realpolitik in International Law: After Tanzanian-Ugandan Conflict "Humanitarian Intervention" Reexamined*, 17 WILLAMETTE L. REV. 859, 890 (1981).

aims of humanitarian intervention and the magnitude of moral depravity of which any number of twentieth century regimes have been capable.

However, a number of considerations have conspired to minimize the current standing of the doctrine. One consideration has been the recognition by many states that, as a practical matter, they are more likely to be subject to humanitarian intervention by one of the relatively few states capable of global humanitarian intervention³⁰ than they are to engage in humanitarian intervention themselves. Therefore, it is in at least the narrow, selfish interest of such governments, especially those engaging in substantial human rights abuses, to characterize humanitarian intervention as a pretext designed to legitimize invasion of the weak by the strong. Accordingly, some argue that humanitarian intervention is "simply a cloak of legality for the use of brute force by a powerful state against a weaker one,"³¹ and that "[e]xperience has shown how readily more powerful states have used the pretext of a higher good to impose their will and values on weaker states."³²

Doubtless, the doctrine of humanitarian intervention carries the risk of these and other³³ adverse consequences. Also, the risks and cost of the doctrine of humanitarian intervention are enhanced in some respects, rather than diminished, when one considers that humanitarian intervention can be undertaken by smaller states not ordinarily classified among the world's major imperialist powers.³⁴ Even when humanitarian intervention appears successful and avoids the danger of promoting protracted guerrilla or conventional war, its costs may be high. Western ethnocentrism, insensitivity to or ignorance of local values, the unpredictability of subtle, undesired long-term consequences and the undermining and disruption of national autonomy and of fragile national institutions should give the potential intervenor pause.

30. See R. FALK, HUMAN RIGHTS AND STATE SOVEREIGNTY 85 (1981) ("only a few powerful states are in a position to use their economic, cultural, and military power on behalf of human rights").

31. Hassan, *supra* note 29, at 862.

32. Schacter, *supra* note 16, at 294.

33. Immanuel Kant, for example, argued in substance that humanitarian intervention jeopardizes the autonomy of all states, and not merely the weak. See I. KANT, PERPETUAL PEACE 7 (L. Beck ed. 1957).

34. The intervention by Tanzania into Idi Amin's Uganda might well fall into the category of at least mixed-motive humanitarian intervention, for example. See Hassan, *supra* note 29, at 860.

However, these considerations hardly suffice to show that the doctrine is so fatally subject to abuse that it should have no legitimate role to play in international law and morality. Abolishing the doctrine or even the practice of humanitarian intervention might not even significantly reduce, let alone abolish, the adverse consequences thought to be associated with humanitarian intervention. If the doctrine is a mere pretext for imperialism, imperialism may readily find other suitable pretexts if deprived of this one. In addition, the "supply" of humanitarian intervention is restricted not only by questionable assessments by the intervenor of the cost imposed by the intervention on the recipient state, but also by the intervening state's assessment, post-Vietnam and post-Afghanistan, of the possible cost in blood, treasure, and morale, to the intervening state itself. These costs, which may be increasing, must be added to the potential cost to the intervenor in the broader international community if the intervention turns out to be less than universally popular. Balanced against these costs, from the self-interested standpoint of the potential intervenor, would be the perhaps limited self-interested benefits likely to accrue from the intervention, which may gradually be diminishing over time. From a purely economic standpoint, as the value of individual life in the most powerful states has increased along with per capita wealth, the net economic value to the intervening state of the cruder sorts of resource transfers associated with any activity characterized as humanitarian intervention has been diminishing. Nations, it is widely becoming recognized, do not achieve or maintain healthy economies by pretextual seizures of the resources of the weak.³⁵

These themes will be developed further below, but it is enough for the moment to appreciate that at least at the present historical juncture, humanitarian intervention, even with any and all necessarily attendant evils, may well be "undersupplied" from any collectively rational standpoint. While there may arguably be good grounds for not morally condemning developing states,³⁶ or for being skeptical of rules of international law to which not all states are reciprocally vulnerable in any realistic sense,³⁷ none of the considerations against

35. See generally the illuminating essays in P. BAUER, *REALTY AND RHETORIC: STUDIES IN THE ECONOMICS OF DEVELOPMENT* (1984).

36. Cf. the "fundamental principle of the OAU never to condemn member states" referred to in Hassan, *supra* note 29, at 873 n.79.

37. Not knowing the realistic likelihood of one's own state being subject to humanitarian intervention by another state may help provide the best grounds for endorsing the morally soundest approach to the issue of humanitarian intervention. See the rationale for the "veil of ignorance" device developed in J. RAWLS, *A THEORY OF JUSTICE* 136-42 (1971).

humanitarian intervention seem to rise to the status of moral absolutes. At most, they counsel great caution. If we look solely to the short and long term interests of the nation subject to humanitarian intervention, it is implausible to suggest that successfully preventing or halting the depredations of a government bent on the execution of a substantial fraction of its own subjects can never be morally justified. At some point, preventing mass carnage will outweigh the considerations against humanitarian intervention, in part because considerations of nation-building, the healthy growth of indigenous institutions, and local autonomy begin to tell on the side of humanitarian intervention. The extent to which humanitarian intervention should be legitimized in less extreme circumstances will be considered below.

The doctrine of humanitarian intervention is not merely subject to criticism as an instrument of oppression of the weak by the strong, but that the doctrine is more broadly open to abuse, manipulation, rationalization, and overextension. One commentator has concluded flatly that "humanitarian intervention is so blatantly open to spurious claims that it should not be countenanced."³⁸ More colorfully, the doctrine allegedly lacks "a means that is both conceptually and instrumentally credible to separate the few sheep of legitimate humanitarianism from the herds of goats which can too easily slip through."³⁹

The doctrine of humanitarian intervention is susceptible to abuse. But the more decisive issue has been, at least as far back as the debate on the point between Grotius⁴⁰ and Vattel,⁴¹ that of the appropriate weight to be assigned to this susceptibility. On this score, proponents of humanitarian intervention are not without response. For example, even if "interventionary precedents once set are likely to be extended to more dubious instances,"⁴² the same may be said of any well-justified legal rule or precedent. Freedom of political speech in the United States has been extended to provide free speech protection for ordinary commercial nude dancing,⁴³ a "more dubious in-

38. Clark, *Humanitarian Intervention: Help to Your Friends and State Practice*, 13 GA. J. INT'L & COMP. L. 211, 213 (1983). See also Ball, *Ironies of Intervention*, 13 GA. J. INT'L & COMP. L. 313, 314 ("a rule of non-intervention commends itself to us because the contrary rule so readily falls prey to cynical manipulation").

39. Franck & Rodley, *After Bangladesh: The Law of Humanitarian Intervention by Military Force*, 67 AM. J. INT'L L. 275, 284 (1973).

40. See H. GROTIUS, *THE RIGHTS OF WAR AND PEACE* 289 (M. Dunne ed. 1901) (reprinted 1979) ("right does not necessarily lose its character from being in the hands of wicked men").

41. E. VATTEL, *THE LAW OF NATIONS* 137 (T. Johnson & J. Johnson eds. 1863) (reprinted 1982) ("[c]ould it escape Grotius . . . that . . . his opinion opens a door to all the ravages of enthusiasm and fanaticism, and furnishes ambition with numberless pretexts?").

42. R. FALK, *supra* note 30, at 168.

43. See *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981).

stance," but we do not reflexively abandon our concern for protecting political speech in response. The value of the legitimate principle, as well as the frequency and severity of its unavoidable abuse, must be considered with some care.

More importantly, the focus should be not on the abuses perpetrated in the guise of humanitarian intervention, but on the potentially less serious sum of abuses that occur only because of the available pretext of humanitarian intervention. Other suitable pretexts may be available such that if humanitarian intervention cannot be used as a cover, the iniquitous abuse will occur anyway under the guise of some other equally suitable doctrine. It may be true, for example, that Hitler happened to seize upon the doctrine of humanitarian intervention in what was an utterly unconvincing⁴⁴ attempt to justify his annexation of Czechoslovakia and his invasion of Poland.⁴⁵ The critical question is, however, whether Hitler would have been deterred from engaging in these depredations had the doctrine of humanitarian intervention been unavailable for some reason. A sense of realism prompts us to recognize that if the pretext of humanitarian intervention had been unavailable, Hitler simply would have seized upon some other equally implausible doctrine, such as self-defense or the protection of German nationals in foreign states. The harm, in a word, would have occurred anyway, with or without the doctrine of humanitarian intervention.

Even more fundamentally, the rise of contemporary moral relativism⁴⁶ has contributed to undermining the moral appeal of the doctrine of humanitarian intervention. Relativism in the moral realm may eventually lead to relativism in international law. This process has reached the point at which "[i]nternational law seems unable to distinguish, on a principled basis, the Soviet invasion of Czechoslovakia from the Tanzanian invasion of Uganda, let alone the United States' invasion of Grenada."⁴⁷

It is often difficult to know enough about the subtle cultural strands binding a foreign society together to have confidence in our inclination

44. See Bond, *supra* note 4, at 74.

45. See *id.*; Bazylar, *supra* note 1, at 584.

46. See Parker v. Levy, 417 U.S. 733, 765 (1974) (Blackmun, J., concurring) ("[r]elativistic notions of rights and wrong . . . have achieved in recent times a disturbingly high level of prominence in this country . . .").

47. Levitin, *supra* note 3, at 622. Quincy Wright has written more broadly that "[i]nternational law cannot protect the new states of Asia and Africa from subversive intervention by Communist states without protecting the Communist states of Eastern Europe from subversive intervention by democratic states of the West." Wright, *supra* note 2, at 531.

to violate its territorial integrity or political sovereignty.⁴⁸ But to succumb to either cultural agnosticism or moral relativism to the extent necessary to undermine the doctrine of humanitarian intervention is to fall into an error no less serious than that of cultural arrogance, ethnocentrism, or the uncritical projection of our own values into other cultures. A tribe, for example, that is fleeing its home territory in apparent stark terror may in fact be suffering persecution in a recognizable way, rather than merely participating in some profound cultural ritual too ineffable for the potential intervenor to grasp.

It has been said that "[t]here is something very different about ending the Prague Spring and ending the reign of Idi Amin."⁴⁹ Such a view is persuasive to many, despite the rise of moral relativism and the need for modesty in presuming to understand and influence foreign cultures. What leads us to act upon such views, despite the distinct possibility that such humanitarian intervention is not permissible under positive international law, is the related sense that when the dictates of morality conflict with those of international law, it is the dictates of morality that must control.⁵⁰

Ironically, there is a sense in which moral and cultural relativism may actually pave the way for humanitarian intervention. The argument may be made that a potential intervenor should respect the popular institutional choice of a foreign people, however depraved or barbaric that choice may appear to some outsiders. This argument may itself depend upon some non-relativist premise which may conflict with other non-relativist moral principles. But equally importantly, why is the would-be intervenor morally required to defer to the value choices of the potentially intervened-upon state? It may be said that mass killings are right for some societies, if wrong for others. It is not clear, however, why the intervening state might not equally demand the world's respect for its choice to intervene. Perhaps intervening in the largely internal affairs of other states is right for some states, if not for others. There may well be some relevant moral difference between what a society does internally, to itself, and what it does to unconsenting foreign states. Such a difference, however, takes on effective moral weight only when seen as a non-relativist moral consideration, and as only one such consideration among others.

48. See Walzer, *The Moral Standing of States: A Response to Four Critics*, 9 PHIL. & PUB. AFF. 209, 212 (1980).

49. Levitin, *supra* note 3, at 622.

50. Cf. K. BAIER, *THE MORAL POINT OF VIEW* vii (1965) (moral rightness of an act as providing a conclusive reason for doing it).

III. THE MORAL AND PRACTICAL BASES FOR AN EXPANDED DOCTRINE OF HUMANITARIAN INTERVENTION

A broad, permissive principle of humanitarian intervention need not be based upon some narrow, controversial set of ethical principles. Humanitarian intervention, in forms as mild as noncoercive multilateralism⁵¹ or as extreme as political assassination⁵² may be morally justified under a variety of theories. Humanitarian intervention generally might be justified on any of a variety of human rights-based approaches.⁵³ Appeals to the natural law tradition may⁵⁴ or may not⁵⁵ be considered useful in this context. And while some will repudiate a narrowly utilitarian⁵⁶ approach to humanitarian intervention,⁵⁷ there is some potential force to even a purely utilitarian justification of some acts of humanitarian intervention. Suppose it could be reasonably known that a particularly bloodthirsty tyrant, ruling mainly by fear, intimidation, and mutual suspicion, and without any significant popular support, determined arbitrarily to torture and kill the nation's middle class.⁵⁸ A utilitarian approach to humanitarian intervention might take into account the subtle, indirect, long-term nation-building or cultural costs of intervention, to the extent reasonably knowable, as well as the likelihood of a less barbaric successor. But if no less distasteful means were available, even political assassination, under some moral theories, might seem permissible, if not required, even if this were

51. See, e.g., J. NICKEL, MAKING SENSE OF HUMAN RIGHTS 10-11 (1987).

52. See, e.g., Note, *The Legality of Assassination as an Aspect of Foreign Policy*, 27 VA. J. INT'L L. 655, 676-77 (1987) ("[t]he legality of assassination as a form of humanitarian intervention under the framework set forth by scholars . . . seems doubtful").

53. See L. HENKIN, THE RIGHTS OF MAN TODAY 108-09 (1978); J. NICKEL, *supra* note 51, at 10-11; Bilder, *Rethinking International Human Rights: Some Basic Questions*, 1967 WIS. L. REV. 171; De Schutter, *Humanitarian Intervention: A United Nations Task*, 3 CAL. W. INT'L L.J. 21, 27 (1972).

54. See Reisman, *Article 2(4): The Use of Force in Contemporary International Law*, 78 PROC. AM. SOC. INT'L L. 74, 79-80 (1986).

55. See Watson, *supra* note 23, at 613 ("reliance on natural law . . . is not a particularly persuasive position to argue from, due to the general disrepute into which natural law has fallen"). But cf. George, *Recent Criticism of Natural Law Theory*, 55 U. CHI. L. REV. 1371 (1988) (explicating and, to a substantial degree, defending the contemporary natural law approaches of Germain Grisez and John Finnis).

56. For an extended analytical treatment of the utilitarian tradition generally, see, e.g., D. LYONS, THE FORMS AND LIMITS OF UTILITARIANISM (1965).

57. See, e.g., F. TESON, *supra* note 8, at 116 ("[t]he moral imperative to fight evil sometimes overrides calculations in terms of death and sufferings").

58. For a sense of some of the moral issues involved in killing one person in order to save numerous others under various moral circumstances, see, e.g., Thomson, *The Trolley Problem*, in RIGHTS, RESTITUTION, AND RISK 94 (W. Parent ed. 1986).

thought to tarnish the intervenor's image, or to license more indiscriminate further assassination or terrorism.

Humanitarian intervention is therefore not tied to any particular sort of moral foundation. That it is not frequently undertaken hardly establishes that it is generally indefensible on any widely accepted moral scheme. From an economic perspective, humanitarian intervention may well qualify as a "public good" that is systematically supplied in suboptimal amounts.⁵⁹ Intervening states often cannot charge their beneficiaries, the offending government, or the international community, a price remotely resembling the net benefit conferred by the intervention. Many states and groups who would gain substantially by the intervention of any of a number of parties would be tempted to seek "free-rider" status.⁶⁰ That humanitarian intervention, even of enormous net benefit, is not frequently supplied may therefore reflect not the shakiness of its moral foundations, but the imperfection of the market for humanitarian intervention.

Some concede that there may not only be a right, but a duty, to "rescue" human lives if one can do so at a not disproportionate cost,⁶¹ regardless of the intervenor's inability to collect a reward for the act of intervention. However, even those who subscribe to such a view may fail to perform rescues, or to engage in appropriate acts of humanitarian intervention, for reasons that do not impugn the moral right or obligation to do so. States and peoples were made vividly aware by television of the nature and scale of the depredations perpetrated by Uganda's Idi Amin,⁶² as they are of other plausible candidacies for humanitarian intervention. Doubtless there may be morally cogent reasons for delaying intervention, or for not intervening

59. For the general theory, see R. HARDIN, *COLLECTIVE ACTION* 17-20 (1982); M. OLSON, *THE LOGIC OF COLLECTIVE ACTION* (rev. ed. 1971). A brief definition, serviceable for present purposes, holds that "[a] pure public good is a good such that when it is supplied to any party it cannot be withheld from supply to any other party, and/or such that supply to one party does not diminish supply to any other party." B. MITNICK, *THE POLITICAL ECONOMY OF REGULATION* 171 n.21 (1980).

60. See B. MITNICK, *supra* note 59, at 111.

61. Cf. VT. STAT. ANN. tit. 12, § 519 (1973) (requiring reasonable assistance to the gravely physically imperiled where no danger to the rescuer or interference with other important obligation is involved). For a philosophical treatment in the realm of charity, rather than humanitarian intervention, see Singer, *Famine, Affluence and Morality*, in *PHILOSOPHY, POLITICS AND SOCIETY* 33 (P. Laslett & J. Fishkin eds. fifth series 1979) ("we ought to give until we reach the level . . . at which, by giving more, I would cause as much suffering to myself or my dependents as I would relieve by my gift").

62. See Ullman, *Introduction: Human Rights — Toward International Action*, in *ENHANCING GLOBAL ECONOMIC RIGHTS* 1, 4 (J. Domínguez, N. Rodley, B. Wood & R. Falk eds. 1979).

at all in such cases. But a belated intervention, or failure to intervene at all, may also be attributable to social and psychological dynamics of no substantial moral weight.

There may, for example, be international analogues of the well-known incident involving the attack on Kitty Genovese:

Consider the thirty plus citizens of Kew Gardens in New York City who, some years ago, stood mute, in the safety of their homes, as one of their neighbors, Kitty Genovese, screamed for help as she was being stabbed to death. No one rushed heroically to her aid. No one shouted an alarm. No one even telephoned the police.⁶³

In at least some loose, less extreme sense, such an incident is paralleled in the international context when a number of states intervene either belatedly or not at all under circumstances fairly calling for humanitarian intervention. The problem is in part that a number of potential intervenors exist and are aware not only of the plight of the victims, but also of the presence of other potential intervenors. There is some experimental grounds to suspect that increasing the number of potential intervening states, all of whom are known as potential intervenors, actually tends to reduce the probability of a timely rescue. For example, psychologists Latané and Darley, as a result of their well-known studies, concluded that at the level of individuals, as opposed to nations, the presence of multiple potential intervenors tended to slow or discourage rescues through a process of diffusion of responsibility.⁶⁴

A diffusion of responsibility model makes the greatest sense when dealing with a collection of strangers rather than organized rescue squads. But if the international community is not precisely a collection of strangers, neither are states presently organized by treaties into rescue squads with assigned responsibilities under particular contingencies. To the extent that something like the diffusion of responsibility model helps account for the infrequency of humanitarian intervention, we have one more reason for suspecting that the incidence of humanitarian intervention may be suboptimal from the standpoint of collective welfare.

In part, the opposition to liberalized rules of humanitarian intervention is based on the lessons of history. While we may in a sense deplore the fact that "[t]he world tends to stand by as governments

63. H. HORNSTEIN, *CRUELTY AND KINDNESS* 3 (1976).

64. See generally Latané & Darley, *Social Determinants of Bystander Intervention in Emergencies*, in *ALTRUISM AND HELPING BEHAVIOR* 13-27 (J. Macauley & L. Berkowitz eds. 1970).

slaughter the political opposition, native populations on desirable land, or racial minorities,"⁶⁵ we may suppose that the lessons of history in fact counsel such passivity. There is certainly at least some grounds to believe that "[t]he historical record of so-called humanitarian intervention bears out [a] skeptical response to those governments who currently proclaim themselves the global guardians of human rights."⁶⁶

Such historically-based arguments are difficult to dismiss with any confidence. How a dispassionate but benevolent analyst would go about authoritatively striking the balance between the assumed net negative consequences for colonial African human rights attributable to Britain's past interventions, as against an earlier intervention against Pol Pot, Idi Amin, or even Hitler, is unclear. This article does not presume to address the monumentally complex task of calculating the costs and benefits of the humanitarian intervention doctrine in the past.

Somewhat more manageable, if still speculative, is the task of determining whether contemporary historical trends suggest that a liberalized doctrine of humanitarian intervention is justifiable. It may well be that even if the doctrine was not worth its cost in the past, it may be worth it today, as historical and economic circumstances change. Fear of widespread serious abuse of the humanitarian intervention doctrine may well be less justified in light of reasonably clear, stable, long term trends.

One such stable, long term trend is that of the sheer economic value of a human life. In some sense, an individual human life possesses a dignity not susceptible to measure in terms of price. Doubtless the problem of poverty even in absolute terms persists. But at least for Western and many other societies generally, there has been "an immense increase in the material well-being of virtually all strata"⁶⁷ over the period from the middle of the nineteenth century to the present.

There are two preeminent implications that flow from this established trend. First, there is less practical point to legal restrictions on humanitarian intervention, because potential intervenors realize that their own risks, or potential costs, in human lives, from an unsuccessful or a messy or extended intervention are greater today than formerly. The average intervenor, as a nation or as an individual, simply has more to lose by death or destruction than formerly. To some extent this is offset by the increasing ease with which a given

65. Watson, *The Limited Utility of International Law in the Protection of Human Rights*, 74 PROC. AM. SOC. INT'L L. 1, 3 (1980).

66. R. FALK, *supra* note 30, at 2.

67. P. BERGER, *THE CAPITALIST REVOLUTION* 41 (1986).

instrument of military intervention or automated weaponry can be purchased. Instead, the primary effect seems to be in the direction of increased recognition that modern societies are increasingly accumulating an immense amount of hard-earned per capita economic value, and that each individual's life is of increasing value in an economic sense.⁶⁸ Some or all of this unprecedented wealth is jeopardized by humanitarian intervention, as all societies increasingly appreciate.

Second, restrictive approaches to humanitarian intervention become less justifiable when the beneficiaries of prospective humanitarian intervention may now tend to have much more to gain from such intervention than formerly. Someone who was helped by military intervention to leave the precursor of Vietnam or Kampuchea 100 years ago might have successfully avoided an undesirable fate, but the probable sheer economic value of their life elsewhere may not have been substantially higher. Today, someone who escapes the Pol Pot regime and settles in the United States, or elsewhere, may not only save his or her life, but stupendously increase their economic prospects in absolute and relative terms.

It is also important to recognize the world's increasing appreciation of the fact that the route to substantial national wealth is decreasing, if at all, through bogus claims of humanitarian intervention. It may once have been plausible to suppose that the optimal path to national wealth was through the expedient of stealing or extorting the wealth of another state under the pretext of humanitarian intervention. Such a technique, however, is increasingly seen as at best outdated. The obvious positive models — Japan and West Germany after World War II, South Korea, Taiwan, Singapore, Hong Kong, and others⁶⁹ — hardly stand as testimonials to the efficacy of colonialist land-grabs as the royal road to substantially increased wealth. Particularly for the larger powers, the overall cost-benefit ratio of attempting to seize control of material resources under the pretext of humanitarian intervention is clearly increasing.⁷⁰ The *sine qua non* of national wealth today is not a matter of physical resources, but of voluntarily mobilized and developed human capital.

68. This recognition may help in some measure to account for the unwillingness of both the United States and the Soviet Union to respond to military frustrations in Vietnam and Afghanistan respectively by military means within their technical capabilities.

69. See P. BERGER, *supra* note 67, at 11.

70. It should be noted that this trend does not depend upon any assumption of relatively good or improving relations between and among the superpowers.

A final historical consideration, perhaps more controversial, is that despite the undeniable inexactness of the social sciences, the world knows more than it did 50 years ago about the merits of particular substantive theories of humanitarian intervention. Fifty years ago, humanitarian intervention, to help place a recognizably Marxist-Leninist government in power on the assumption that this strategy of coercive central economic direction would promote rapid economic growth and respect of human rights, may have had some particular degree of plausibility. Today, the plausibility of such a strategy has decreased. There is doubtless still some ambivalence about this,⁷¹ and it is clear that a private market economy is no guarantee of either economic success or respect for basic human rights.⁷² But the cumulative evidence, including for example the recent experience of Colonel Mengistu's collectivization of Ethiopia,⁷³ and the post-World War II experience⁷⁴ has generally undermined the plausibility of any association between genuine humanitarian intervention and externally assisted Marxist-Leninist revolution.

Since the end of World War II, the Soviet Union has, within the limits of its perhaps overstrained capacities, perpetrated a number of excesses partially in the name of humanitarian intervention, including the invasion of Afghanistan. Of course, "[a]ny government willing to believe that the Soviet invasion of Afghanistan constituted humanitarian intervention would support the Soviets whatever the content of international law."⁷⁵ It seems fair to suggest, however, that even a substantial liberalization of the doctrine of humanitarian intervention would not lead to a significant increase in Soviet abuses. This may partly be due not only to increasing resource constraints and any change in the Soviet world-view, but also to the availability of other minimally distinct purported justifications for external adventures, such as the Brezhnev doctrine,⁷⁶ wars of national liberation,⁷⁷ mutual

71. See R. FALK, *supra* note 30, at 7 (recognizing "the disappointing record of socialist states with respect to safeguarding the political, civil, and cultural rights of their citizens," but concluding that "a humanistic socialism seems to be the best hope for the future for the overwhelming majority of societies in the world").

72. See generally the thoughtful analysis of Peter Berger in P. BERGER, *PYRAMIDS OF SACRIFICE* (1974).

73. See Bazyler, *supra* note 1, at 558 (noting the historical ability of Ethiopian farmers to at least prevent famine prior to Mengistu's collectivization of agriculture).

74. See, e.g., P. BAUER, *supra* note 35, at 19-37; P. BERGER, *supra* note 67, at 37; M. NOVAK, *THE SPIRIT OF DEMOCRATIC CAPITALISM* 106 (1982).

75. Levitin, *supra* note 3, at 655.

76. See Moore, *Legal Standards for Intervention in Internal Conflicts*, 13 GA. J. INT'L & COMP. L. 191, 197 (1983) (discussing the Brezhnev Doctrine).

77. See, e.g., R. VINCENT, *supra* note 1, at 374; Bilder, *supra* note 53, at 201.

defense obligations,⁷⁸ and the presumed categorical superiority of the socialist system.⁷⁹ Consistent reliance on alternative justifications would also entail the advantage, from the Soviet standpoint, of allowing the Soviet Union to decry humanitarian intervention by other states as objectionable interference in the internal affairs of sovereign states.⁸⁰

IV. COSTS AND BENEFITS OF AN EXPANDED DOCTRINE OF HUMANITARIAN INTERVENTION

It is no doubt difficult to pronounce authoritatively on the net consequences for the world if well-intended humanitarian intervention were to become more common. The notion may strike some as potentially destabilizing and therefore troubling. But it is useful to recall that this article argues not necessarily for substantially expanded actual, or more frequent, use of humanitarian intervention. Rather, this article argues for expanding or liberalizing the legitimate availability of the doctrine under international law, so that potential intervenors are not unreasonably discouraged by considerations of international law or the international condemnation stemming from the intervenor's arguable violation of international law.⁸¹

Even the most successful, richly justified humanitarian intervention imposes costs in the form of stress from adapting to significant rapid change within the targeted society, however beneficial.⁸² Beyond this, coercive humanitarian intervention may, however well justified, encourage or tend to legitimize coercive approaches to international disputes in general, even where unjustified.⁸³ In fact, precisely the most surgically successful interventions, with least cost to the intervenor, may have the greatest such demonstration effect.⁸⁴

78. See, e.g., Bazyler, *supra* note 1, at 585-86.

79. See, e.g., R. VINCENT, *supra* note 1, at 11; Franck & Rodley, *supra* note 39, at 288; Moore, *supra* note 76, at 197.

80. See Wright, *Subversive Intervention*, 54 AM. J. INT'L L. 521, 522 & 522 n.3 (1960).

81. A certain measure of hypocrisy may circulate around such international condemnation. Imagine the circumstance of the destruction, by a third party not directly threatened, of the nearly complete atomic weapons production facilities of two fanatical, implacably hostile states. Such an intervention would doubtless draw, simultaneously, nearly universal official condemnation, and nearly universal heartfelt gratitude and relief not officially expressed.

82. See generally, P. MARRIS, *LOSS AND CHANGE* (1975).

83. See Franck & Rodley, *supra* note 39, at 299 n.105. For the role of modeling and desensitization generally in social behavior, see generally A. BANDURA & R. WALTERS, *SOCIAL LEARNING AND PERSONALITY DEVELOPMENT* (1963).

84. If so, this might tend to constrain the overall net cost of all purported humanitarian interventions, justified and unjustified, combined.

Other potential costs of intervention, as discussed in section II above, may take various forms. Externally imposing even a morally justified policy on a determined minority of the local citizenry may be surprisingly costly.⁸⁵ It is important to recognize that most of this cost will be directly borne by the prospective intervenor itself, who is likely to appreciate, especially after Vietnam and Afghanistan, the need to expect unexpected costs in intervening. The cost of protracted intervention, perhaps involving territorial administration⁸⁶ in cases where sabotage of that administration by opponents may be relatively inexpensive, will be obvious to potential intervenors. Appreciation of the potential cost makes international legal restrictions on humanitarian intervention less necessary.

There is no guarantee, however, that even carefully planned humanitarian intervention will not backfire, or even inspire a negative reaction within the targeted society.⁸⁷ Such an intervention may simply amount to one more episode in a persistent failure of the particular indigenous regime to attain either stability or legitimacy.⁸⁸ The very circumstances of the intervention, however, may limit the potential cost of instability, nation-building, and disorganization. For example, Ethiopia has been among the prime candidates for humanitarian intervention over the past few years. It has been said that "Ethiopia now has the dubious distinction of having both the worst human rights record in the world . . . and the lowest per capita gross national product"⁸⁹ This conjunction may not be entirely fortuitous. One implication is that as long as the human rights-motivated intervenor into Ethiopia is reasonably effective in promoting the production and distribution of food and health care, the net effects of the intervention are likely to be positive, regardless of its political success or failure, or any unexpected consequences generated in other respects.⁹⁰

85. See, e.g., Bilder, *supra* note 53, at 202.

86. See Graham, *supra* note 7, at 326.

87. See Watson, *supra* note 23, at 630.

88. See M. NOVAK, *supra* note 74, at 294.

89. See Bazzyler, *supra* note 1, at 612 n.312 (citations omitted).

90. It is technically possible that Colonel Mengistu's successor might turn out to be worse, from both the human rights and economic standpoint, given sufficient bad luck, societal passivity, and so forth. But one must choose either to intervene or not intervene, and assuming Mengistu's superiority to his probable successor, given the low baseline, not to intervene may not seem the morally responsible choice. If the successor does in fact turn out to somehow be worse, there will still be a case of some strength for humanitarian intervention against that regime.

The sheer disapproval by other states of one's intervention certainly counts as a very real cost of intervening.⁹¹ It may be that great, unnecessary evil has been perpetuated merely because a would-be intervenor reasonably feared the diplomatic consequences of intervention. The problem is that the force of international condemnation of intervention remains, whether such condemnation is justified or not. Domestically, many criminals no doubt object vehemently to being imprisoned, but we do not ordinarily require that criminal prosecutions be widely popular, perhaps even among those prosecuted. Broadening the legitimate scope of humanitarian intervention, if undertaken as a matter of a consensual change in international law, would therefore by itself reduce one of the significant costs of humanitarian intervention, namely that of the sheer magnitude of the international diplomatic pillorying undergone by the intervenor.

It is often argued that humanitarian intervention of a military sort is inherently self-defeating. It has been colorfully suggested that "guns do not have . . . the gift of diminishing the number of corpses or of disinfecting the atmosphere corrupted by their smoke."⁹² This, however, is either equally true of ordinary domestic police activities, or is quite possibly false. There is some reason to suppose that the frequency of human rights violations may bear some relation to the probability and severity of the sanctions imposed on such rights violations.⁹³ A broader theory of justified humanitarian intervention, to the extent that it tends to enhance either the probability or the severity of sanctions imposed on inhumane governments, may well reduce the incidence of human rights violations through a classic deterrence effect.⁹⁴

Increased deterrence, however, cannot be guaranteed as the inevitable result of a broader legitimization of humanitarian intervention. One writer has suggested that reservation by some states of a right to humanitarian intervention "may make other states reluctant to accept legal obligations concerning human rights."⁹⁵ Such a reaction can hardly be ruled out. What is doubtful, however, is its moral and practical significance. What civilized society cares about preeminently

91. See L. HENKIN, *supra* note 53, at 110 (human rights-based intervention commonly seen as officious meddling).

92. TANOVICEANE, *DROIT INTERNATIONAL DE L'INTERVENTION* 12-13 (1884), *quoted in* Hassan, *supra* note 29, at 883.

93. See Farer, *Humanitarian Intervention: The View from Charlottesville*, in *HUMANITARIAN INTERVENTION AND THE UNITED NATIONS* 149, 155 (R. Lillich ed. 1973).

94. For a discussion of the domestic criminal deterrence analogy, see J. WILSON, *THINKING ABOUT CRIME* 195-97 (1977).

95. Akehurst, *supra* note 13, at 111.

is not whether a government accepts particular legal standards with respect to human rights, but how that government in fact behaves with respect to human rights. We care more about deterring egregious human rights violations than about inducing potential violators to adopt formally the relevant legal norms. What is morally objectionable about a Pol Pot or a Colonel Mengistu is what they do substantively. Catching a Pol Pot or a Mengistu in an alleged violation of their own international legal promise to adhere to certain minimal civil rights standards seems morally inconsequential and may in fact be disastrous if the price to be paid is our foreswearing the possibility of humanitarian intervention.

A final general concern is whether a liberalized international law of humanitarian intervention might not unfortunately tend to undermine the domestic order and authority structure of the state subject to intervention in ways that might jeopardize the attainment of any sort of just social order within that society.⁹⁶ Relatedly, one might fear that a broader principle of humanitarian intervention might tend to undermine the necessary order not so much within the target state, as in the general international community. Allowing the use of force for humanitarian intervention might tend to disinhibit restraints on the use of military force for other far less legitimate purposes.⁹⁷

Such arguments, however, carry great moral weight in only narrow contexts. A large group that is being systematically massacred may strongly prefer even temporary anarchy, or a reversion to regional or tribal government, to annihilation. Also, we do not normally fear that ordinary domestic police activity simply makes matters worse by somehow serving to legitimize the application of violence for criminal purposes. Instead, it seems entirely possible that humanitarian intervention sends signals that are on balance conducive to achieving a just international order. Humanitarian military intervention, it may plausibly be argued, may tend to call attention to and promote respect for some of the basic moral values sought to be served by the international and domestic legal order itself.

This might tend to occur even in cases in which the humanitarian intervention falls outside the scope of an unduly narrow, constricted set of international legal justifications. One might consider the domestic law analogue of civil disobedience in which a legally racially segregated lunch counter is forcibly or coercively integrated by conscientious⁹⁸ black protesters, who are then peaceably arrested, tried, and

96. See R. VINCENT, *supra* note 1, at 346.

97. See Behuniak, *supra* note 7, at 182.

98. See C. COHEN, CIVIL DISOBEDIENCE 131 (1971) (civil disobedience as "more often a manifestation of respect for law than of contempt for it").

convicted. It is hardly self-evident that the campaign of Dr. Martin Luther King, Jr. did more to undermine than to ultimately strengthen the rule of law. Just as the enforcement of unjust laws may engender disrespect for the system of laws,⁹⁹ so even coercive humanitarian intervention may, in appropriate instances, contribute to the sense of the basic equitableness of the system of laws in such a way as to strengthen the system of laws on balance.

V. PROPOSED RESTRICTIONS ON THE DOCTRINE OF HUMANITARIAN INTERVENTION

Even among those at least modestly sympathetic to the idea of humanitarian intervention, it is typically supposed that the international legal permissibility of humanitarian intervention should be severely narrowed by means of a variety of restrictions. Among such possible restrictions would be that the intervenor first have exhausted other peaceful means before intervening with force.¹⁰⁰ Other such restrictions of the doctrine would include a requirement of multilateralism,¹⁰¹ of invitation by the subject state or people,¹⁰² of disinterested motives on the part of the intervenor,¹⁰³ or that the intervention seek to redress serious, severe, widespread, and perhaps imminent abuses.¹⁰⁴ Legal restrictions of this sort seem sensible and prudent. As it turns out, however, they are generally either practically unnecessary, or seriously questionable at the level of moral principle.

Consider first the proposed requirement that the prospective intervenor exhaust less intrusive remedies before resorting to humanitarian intervention, particularly where such intervention would involve military action. In particular circumstances, the legitimate goals of the prospective intervenor might be fulfilled by lesser means, such as unilateral or multilateral private or public diplomacy, verbal expressions of support for oppressed groups, or economic and political sanctions of varying degrees of severity aimed at the offending state.¹⁰⁵ Exhaustion of lesser remedies is typically thought of, however, as only a general requirement. Realistically, "[t]here may be instances

99. *See id.* at 154.

100. *See, e.g.,* Bazylar, *supra* note 1, at 606.

101. *See, e.g.,* Moore, *supra* note 24, at 264.

102. *See, e.g.,* Bond, *supra* note 4, at 62.

103. *See, e.g.,* De Schutter, *supra* note 53, at 29, 36.

104. *See, e.g.,* F. TESON, *supra* note 8, at 117, Fonteyne, *The Customary International Law Doctrine of Humanitarian Intervention: Its Current Validity Under the U.N. Charter*, 4 CAL. W. INT'L L.J. 203, 260 (1974); Levitin, *supra* note 3, at 652-53.

105. *See* Lillich, *supra* note 25, at 279.

where resort to other alternatives may be futile or where it may even compound the tragedy."¹⁰⁶ Under appropriate circumstances, therefore, the requirement of exhaustion of lesser potential remedies may be waived,¹⁰⁷ in loose analogy to the logic of sometimes waiving a requirement of exhaustion of administrative remedies in the domestic legal context.¹⁰⁸

Generally, there seems little practical point to an international legal requirement of exhaustion in this context. Most circumstances involving prospective humanitarian intervention will be such that the state considering military intervention will have the strongest domestic political, economic, and diplomatic incentives to effectuate their aims through means less intrusive than military intervention. Except to the extent that the intervenor's motive is, for example, an imperialist land or resource seizure, or to destroy a threatening army, or some other extrinsic motive, a state contemplating risking battlefield casualties and the costs of war would be exceptionally irrational to ignore much less costly or risky alternative means of achieving its aims. The law in this respect would merely mandate what an even minimally rational self-interested state would do anyway. Balanced against this limited gain from an exhaustion requirement would be the risk that compliance would, in actual practice, sometimes produce a morally unjustifiable delay, as states coped with the uncertainty of applying the exhaustion requirement by creating a diplomatic record of their formal exploration of alternatives to military intervention, merely for purposes of compliance with international law. A state may know that no less intrusive alternatives are practically available while also knowing that weeks would be required to create a contemporary documentary record showing this fact. If the state intervenes without establishing the record in advance, it may never be able to do so after the intervention, when unsympathetic actors are free to announce that they would have fully cooperated with or approved of non-military alternatives.

106. Bazyler, *supra* note 1, at 606.

107. See Behuniak, *supra* note 7, at 188; Fonteyne, *supra* note 104, at 264 (failure to exhaust excusable if the violations sought to be redressed by intervention are imminent). *But cf.* De Schutter, *supra* note 53, at 30 (prohibiting the use of force unless there is "positive proof that all available and reasonably effective means have been exhausted . . . without fair indication of impending successful results" and unless it is "certain" that peaceful means will be unavailing).

108. For a brief discussion of circumstances constituting exceptions to, or excusing failure to fulfil, the general exhaustion requirement, see, e.g., B. SCHWARTZ, ADMINISTRATIVE LAW § 8.31, at 504-07 (2d ed. 1984) (not including civil right-based exceptions).

The cost of a requirement that humanitarian intervention be multilateral or under the aegis of some appropriate international organization is even greater. Those who advocate a multi-lateralism requirement typically assume that such a restriction will reduce the incidence of self-interested abuse of the doctrine.¹⁰⁹ This concern leads back to the question, explored above,¹¹⁰ of whether the cost of abuse stemming from broadening the legal doctrine of humanitarian intervention is likely to outweigh the benefits. However, the multilateralism requirement in particular seems to be ill-suited to the task of encouraging appropriate intervention and discouraging inappropriate intervention. As it has developed, the most effective international organizational support for human rights has tended to develop in those regions of the world least needful of humanitarian intervention.¹¹¹ In theory, it is possible to have recourse to the United Nations for humanitarian intervention where regional organizations are weak, but the record of the United Nations is suspect from a moral standpoint. As one commentator has observed:

It took three years to get the human rights abuses of the Khmer Rouge on the United Nations agenda. Even after United Nations experts concluded that genocide was occurring in Kampuchea, the United Nations Human Rights Commission continued to postpone the matter. To this day, the United Nations has not considered or condemned the human rights violations of the Khmer Rouge¹¹²

There is thus a serious risk that any sort of multilateralism requirement will lead to a morally unsatisfactory frequency of laws on humanitarian intervention.

A multilateralism requirement might be defended on other grounds, however. Those who attribute great importance to building and enhancing the role of collective international organizations in order to supplement or partially replace the current system of sovereign states,¹¹³ may strongly prefer collective or United Nations-sponsored humanitarian intervention.¹¹⁴ From such a standpoint, it may seem worth sacrificing some present lives for the sake of hastening the arrival of a new international order.

109. See, e.g., Moore, *supra* note 24, at 264.

110. See Sections II & III.

111. See L. HENKIN, *supra* note 53, at 104.

112. Bazylar, *supra* note 1, at 553.

113. See, e.g., R. FALK, *supra* note 30, at 7.

114. See, e.g., Bazylar, *supra* note 1, at 602.

Several points might be made in response. First, it is not clear that an expanded doctrine of humanitarian intervention actually retards, rather than furthers, the cause of a new international order transcending individual sovereign states. To expand the scope for intervening in what might otherwise be referred to as the internal affairs of sovereign states is to expand the occasions on which individual state sovereignty may legally be subordinated to other, morally-based considerations. Second, it seems speculative at best, and morally utopian at worst, to risk the sacrifice of large numbers of lives for the sake of only some minimal contribution to long term international organizational change that is itself vague,¹¹⁵ perhaps unattainable,¹¹⁶ and is currently no more popular than is an expanded doctrine of humanitarian intervention.¹¹⁷

It would therefore seem at best not clearly advantageous to adopt a multilateralism requirement for humanitarian intervention. One alternative way of restricting the doctrine would be to adopt one form or another of an invitation requirement. But while an invitation requirement, intended to prevent abuses,¹¹⁸ may seem sensible, it again turns out to be either practically of little value, or positively harmful.

There is some uncertainty as to who is to invite the intervention. Among the candidates would be the recognized government of the state targeted for intervention,¹¹⁹ "the people" of the targeted state,¹²⁰ or the actual victims of the persecution against which intervention is contemplated.¹²¹ Each of these very different formulations poses different issues. Waiting for an invitation by a despotic government to intervene against that government's own despotism of course eviscerates the doctrine of humanitarian intervention. Invitations by "the people" generally will often be difficult to recognize. How do we ascertain the authentic voice of the majority apart from the voice of its government? Even if we knew independently the will of the majority, what is to be done when, as is commonly the case, the human rights or other moral abuses are being practiced against only a minority, or a particular class or ethnic group, with the acquiescence of the majority? This leaves the possibility of requiring only an invitation by the

115. See Watson, *supra* note 23, at 639.

116. See *id.*

117. See R. FALK, *supra* note 30, at 33 ("[i]n most respects national sovereignty at the state level is stronger than ever").

118. See Bond, *supra* note 4, at 62.

119. See Lillich, *Intervention to Protect Human Rights*, 15 MCGILL L.J. 205, 218 (1969).

120. See Levitin, *supra* note 3, at 654.

121. See F. TESON, *supra* note 8, at 119.

victims themselves. While this sort of invitation may seem more readily obtainable, problems of identifying authentic victim spokespersons and of genuine and important disagreements within the victim community remain. There is also the possibility that the victims themselves have been terrorized or brainwashed into not desiring intervention as well.¹²² If so, the intervention may, with no indigenous support, be unpromising as a practical matter anyway.

Realistically, it should nearly always be possible to obtain an invitation from someone to intervene, if not from the government itself. This would seem to be the lesson not only of Prague in 1968, but also of the alleged invitation by Austria in 1938 to be invaded by Hitler and incorporated into the German Reich.¹²³ If in fact an invitation of some sort, however procured, will virtually always be available, the invitation requirement would seem in its weaker version to be of little practical value, and in its more rigorous formulations to eviscerate the doctrine of morally justified humanitarian intervention.

A further alternative restriction would require that the intervention be conducted with some appropriate sort of motive on the part of the intervening state. The central focus of such a requirement is a state of mind of disinterestedness or altruism on the part of the would-be intervenor. The rigor of this requirement varies among its proponents. The formulation may take the relatively demanding form that the intervention be "without self-interest or expectation of national political, economic or military gain."¹²⁴ A bit less stringently, it is sometimes suggested that the "overriding"¹²⁵ motive must be one of protecting human rights, or the most basic human rights, or that the "predominant"¹²⁶ motive be of such character. Alternatively, the motive requirement may be formulated more concretely, if still vaguely, along the lines that there be "no intention to change the political or legal structure of the offending regime."¹²⁷

Ascertaining an actor's motive, particularly when the actor is a state not subject to deposition under oath or mandatory psychoanalysis, is discouragingly difficult.¹²⁸ The matter of state motive

122. See *id.*

123. See Sohn, *Gradations of Intervention in Internal Conflicts*, 13 GA. J. INTL & COMP. L. 225 (1983).

124. De Schutter, *supra* note 53, at 29. See also *id.* at 36 (tainting effect of "political, economic or military motives").

125. See Bazylar, *supra* note 1, at 613; Behuniak, *supra* note 7, at 187; Fonteyne, *supra* note 104, at 261.

126. See Bazylar, *supra* note 1, at 602; Levitin, *supra* note 3, at 652 n.148.

127. D. FORSYTHE, HUMAN RIGHTS AND WORLD POLITICS 28 (1983).

128. On the domestic legal analogue, see, e.g., Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197 (1976).

is typically so inherently nebulous that one should realistically expect those states sympathetic or unsympathetic to an act of intervention to characterize the intervening state's motives in ways consistent with their own evaluation of the merits of the intervention itself. More importantly, purely altruistic, self-sacrificing, disinterested motivation is rare enough among persons,¹²⁹ and strikingly uncommon or easily discouraged on the international scene. To insist on purity of motive is, realistically, to essentially abolish the legal doctrine of humanitarian intervention.

Most cases of humanitarian intervention, or of most voluntary acts generally, are mixed motive cases.¹³⁰ In many of these, we may stipulate, the humanitarian motive is present to some degree, but is not the overriding or predominant motive. Why this should lead to repudiation of the intervention, without more, is unclear. Let us suppose that the United States had militarily intervened in Europe in the 1930s to rescue any person who felt threatened by Hitler. Suppose further that the predominant motive was not disinterested or altruistic, but one based on the perceived national interest. It would seem frankly preposterous to condemn the act, in virtue of its illicit motivation, as wrong. In exchange for such favorable consequences as those achieved in such a case, overlooking motives such as self-defense seems fully justified.

The argument need not be left at the level of the hypothetical. As one scholar has observed:

India's motives for unilateral intervention in East Bengal were not pure: The Bangladesh crisis provided India with a convenient opportunity to diminish the power and halve the territory of its fiercest political and military rival. However, many scholars, citing the mass slaughter of East Bengalis by the West Pakistani army, have considered the Bangladesh intervention to be a leading case of humanitarian intervention.¹³¹

Requiring that the intervenor's motive be predominantly altruistic only makes sense if we have concluded that the otherwise unavoidable cost of a broad humanitarian intervention rule in the contemporary

129. A leading contemporary philosopher suggests that while "[t]here is such a thing as pure altruism," nevertheless "it may never occur in isolation from all other motives." T. NAGEL, *THE POSSIBILITY OF ALTRUISM* 80 (1970).

130. See R. VINCENT, *supra* note 1, at 12 ("any one case of intervention might combine several purposes").

131. Bazylar, *supra* note 1, at 589.

era outweighs the concerns that humanitarian intervention is under-supplied from the standpoint of overall collective welfare. We have seen little reason to accept this. To the extent that we wish to encourage plainly good outcomes, or right actions, the international legal community may be better advised to rely on, and legitimize, the relatively "durable" motives of self-interest, as opposed to the more "fragile" or unstable motives of altruism.

This analysis does not change if the requisite motive is characterized negatively, as in the suggestion that there must be "no intention to change the political or legal structure of the offending regime."¹³² Suppose that the change minimally sufficient to prevent wholesale slaughter under the regime of a Pol Pot or an Idi Amin does in fact involve a change, and an intent on the part of the intervenor to effect a change, in the political or legal structure of the regime in question. The prevention of mass carnage should not be prohibited even in some cases in which legal or political structural changes are intended and effected. Again, this is not to ignore the risks, but to suggest that they may be outweighed.

A final commonly proposed limitation on the legal doctrine of humanitarian intervention is, at its most elaborate, to the effect that such intervention be permitted only in the severest, or most serious cases.¹³³ For example, where the most fundamental rights of substantial numbers¹³⁴ of people are being immediately¹³⁵ threatened, with a substantial degree of certainty.¹³⁶ The general problem associated with these restrictions is that to the extent that they have "teeth," they may well proscribe morally justifiable interventions without compensating gains. However, to the extent that they are relatively undemanding, they redundantly enjoin what the intervening nation would typically have the strongest incentive to do regardless.

Consider, for example, the requirement of certainty. If such a requirement is interpreted in too demanding a fashion, beneficial interventions are ruled out. If a state is legally permitted to intervene in order to save 10,000 lives certain to be lost, it is not obvious why a

132. D. FORSYTHE, *supra* note 127, at 28.

133. See, e.g., F. TESON, *supra* note 8, at 117; Hassan, *supra* note 29, at 895; Levitin, *supra* note 3, at 652-53.

134. See, e.g., F. TESON, *supra* note 8, at 117; Bazzyler, *supra* note 1, at 600; Hassan, *supra* note 29, at 896.

135. See, e.g., Fonteyne, *supra* note 104, at 260; Sohn, *supra* note 123, at 230.

136. See, e.g., Bazzyler, *supra* note 1, at 600 (standard of "clear evidence" of severe deprivations); Hassan, *supra* note 29, at 896 (forceful humanitarian intervention is probably inappropriate "if there is a reasonable prospect" of immediate cessation without such intervention).

similar intervention to save 50,000 people who stand a one-fourth chance of being killed should be impermissible.¹³⁷ While a figure of 25% will doubtless be speculative, the assumption that the deaths in question are nearly certain to occur is also. If, on the other hand, the certainty requirement is watered down, it becomes an international legal requirement that the prospective intervenor not engage in conduct that it expects will be costly and probably pointless.

Other related requirements can be similarly characterized. It is often suggested that to justify humanitarian intervention, the abuses must be systematic, widespread, and pervasive,¹³⁸ or that the violations be persistent.¹³⁹ However, preventing a one-time mass execution of the innocent may, on some appropriate theory, be morally justifiable. Suppose that the Mahatma Gandhi, or his contemporary equivalent, were threatened with death on a transparently false charge of sedition, but that a "surgical" foreign military intervention could save his life and work.¹⁴⁰ Categorically ruling out humanitarian intervention on grounds of lack of "widespreadness" seems insensitive to historical realities and historical possibilities.

These problems may be avoided by revising the requirement so that the intervention must target an abuse that can be said to "shock the conscience."¹⁴¹ Such a formulation may seem less rigid, but may also seem either too narrow and extreme in focusing on only the most horrifying abuses, or so subjective as to fail to supply a workable component of a legal standard. The Supreme Court has on occasion been able to either find¹⁴² or not find¹⁴³ that an alleged due process

137. Cf. the reference to a hypothetical 10% chance of persecution as establishing a "well-founded fear of persecution" in *INS v. Cardoza-Fonseca*, 480 U.S. 421, 431 (1987).

138. See, e.g., *F. TSON*, *supra* note 8, at 117.

139. See *E. STOWELL*, *supra* note 6, at 53.

140. The notion of rescuing Gandhi from such a fate may be thought to carry a distracting emotional appeal. Perhaps even a closer question would be whether intervention, whether called "humanitarian" or not, could ever be morally justified to avoid the certain destruction of commercial property of immense value. The consensus seems to be in the negative. See *Bazyler*, *supra* note 1, at 581; *Farer*, *supra* note 93, at 164. It is not clear why some sort of moral proportionalism cannot be exercised, in at least clear and extreme commercial property cases, without legitimizing some sort of reinvigorated nineteenth century imperialism.

141. See, e.g., *Bond*, *supra* note 4, at 61; *Lillich*, *supra* note 119, at 209. Cf. *E. STOWELL*, *supra* note 6, at 139 (reference to "injustice and cruelty so excessive as to constitute an intolerable abuse and to shock the opinion of other states").

142. See *Rochin v. California*, 342 U.S. 165, 172 (1952) (police behavior as "conduct that shocks the conscience").

143. See *Palko v. Connecticut*, 302 U.S. 319, 328 (1937) (the double jeopardy at issue held not to constitute "a hardship so acute and shocking that our polity will not endure it"), *overruled*, *Benton v. Maryland*, 395 U.S. 784 (1969).

violation shocked the judicial conscience. Realistically, however, we must anticipate that in otherwise controversial cases of humanitarian intervention, whether the purported abuses "shocked the conscience" of some appropriate person could be carried on interminably in a sterile, virtually standardless fashion.

VI. CONCLUSION

Expanding the scope of legally justified humanitarian intervention is not utterly devoid of risks. However, some risks are, given their nature and magnitude, worth taking, in light of the value and probability of achieving not otherwise attainable valued ends. This article has suggested that the current legal prohibition, or narrow circumscription, of the principle of humanitarian intervention is not well grounded in moral or practical concerns. The otherwise avoidable undesirable consequences of the abuse of an expanded doctrine of humanitarian intervention seem to be decreasing historically, and we have seen several reasons to believe that the "supply" of humanitarian intervention is currently substantially less than that which would maximize collective welfare. If the arguments against a broader doctrine of humanitarian intervention are in fact either themselves morally suspect or else losing their historic force, continued international legal repudiation of humanitarian intervention may simply tend to bring international law itself into disrepute among those concerned to do right.

